

NTSB Order No. EA-4197

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 15th day of June, 1994

Docket SE-9549

The Court has remanded this case to us for a new penalty determination in light of its reversal of one of three violations sustained by the Board in NTSB Order No. EA-3335 (served June 26, 1991).¹ For the reasons discussed below, we believe that the sanction for the two regulatory violations affirmed by the Court should be a 45-day suspension of the respondent's commercial pilot certificate.²

²Our original decision agreed with the Administrator that a 60-day suspension for the three violations alleged was appropriate.

The Court held that the evidence did not support our affirmation of the law judge's conclusion that the helicopter flight which was the subject of this action was not an aerial photography operation excepted from the requirements of Part 135 of the Federal Aviation Regulations ("FAR", 14 CFR Part 135). It accordingly reversed our decision to the extent it upheld a violation of FAR section 135.203(b), which prohibits operating a helicopter on a Part 135 flight below 300 feet over a congested area.³ At the same time, the Court upheld the charge, under FAR section 91.79(a), that respondent had operated his helicopter below an altitude which would have permitted an emergency landing without undue hazard to persons or property on the ground and the charge, under FAR section 91.9, that the low flight constituted a "careless or reckless" operation.⁴

Because the FAR section 135.203 allegation in this case essentially sought to reach conduct to some degree also proscribed by FAR sections 91.79 and 91.9, we do not believe the Court's conclusion that it was not applicable in the circumstances of this case significantly affects the proper ultimate judgment as to the overall seriousness of respondent's violations. We therefore believe that a 15-day reduction from

³The Court read Board precedent, specifically Administrator v. Southeast Air, Inc., 4 NTSB 517 (1982), *aff'd*, 732 F.2d 139 (1st Cir. 1984), as requiring a finding that a flight fell within the exception from Part 135 if the pilot before takeoff did not know that his passengers' intent was to do more than just take pictures from the air; that is, that he did not know starting out that they wanted to stop to engage in some activity on the ground before returning to the point of departure. In this case, the Court disagreed with the Board's judgment that there was enough evidence to support a conclusion that the respondent knew that his passengers wanted to land at the site of a train derailment, and it rejected, as contrary to Board precedent, the Board's view that such knowledge could be imputed to respondent based on various circumstances suggesting that a mid-flight landing would likely be requested. Given the difficulty, as this case illustrates, that the Administrator faces in attempting to prove what a pilot actually knows about a passenger's intent before a flight begins, the potential for collusion, and the ease with which Part 135 coverage, and its attendant higher safety standards, can be defeated where the desire for an interim stop can be asserted to have arisen after takeoff, we are concerned that our cases may have broadened the aerial photography exception, or increased its availability, to the point where a re-examination of our precedent's continuing viability should be undertaken when the issue next arises.

⁴FAR sections 91.79(a) and 91.9 have been recodified at, respectively, 14 CFR §§ 91.119(a) and 91.13(a).

the 60 days originally approved will more than adequately reflect the removal of the Part 135 charge from the case.

ACCORDINGLY, IT IS ORDERED THAT:

A 45-day suspension of respondent's commercial pilot certificate shall commence 30 days after service of this order.⁵

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above order.

⁵As previously indicated in Order EA-3335, respondent must physically surrender his certificate to the FAA for the period of suspension ordered herein.